

1 Barry Brody, Bar No. 005227  
2 Annette Burns, Bar No. 009871  
3 Aris Gallios, Bar No. 010619  
4 Helen R. Davis, Bar No. 018309  
5 Keith Berkshire, Bar No. 024107  
6 On behalf of other interested parties as listed herein

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 PETITION TO AMEND RULE 72,  
10 ARIZONA RULES OF FAMILY  
11 LAW PROCEDURE

Supreme Court No. R-16-0037

**COMMENT TO PETITION TO  
AMEND ARIZ. R. FAM. L. P. 72**

**REQUEST FOR HEARING ON  
PETITION**

13  
14 Pursuant to Rule 28, Rules of the Supreme Court, the below signed Arizona  
15 State Bar Certified Family Law Specialists, the Arizona Chapter of The American  
16 Academy of Matrimonial Lawyers, with the members listed individually herein,  
17 and as a Chapter, and numerous family law attorneys (hereinafter the “Group”)  
18 provide the following comments to the Petition for Rule 72 of the Arizona Rules  
19 of Family Law Procedure submitted by Judges Swann and McMurdie on May 18,  
20 2016 (hereinafter “Proposed Amendment”). The Group also submits its own  
21 proposed amendment to Rule 72  
22  
23  
24  
25

## **I. Introduction**

First, the Proposed Amendment significantly affects the ability of a trial court to address complex or difficult family law matters by removing a trial court's ability to appoint a special master, over the objection of one party, during litigation. The removal of this ability is concerning given the significant issues with the parties' ability to secure sufficient trial time in Maricopa County. Removal of this resource will have a detrimental effect on the family court system as a whole.

Second, the Proposed Amendment also eliminates the trial court's ability to utilize special masters for any child related issues, other than the limited issues under ARFLP 74.

The Group therefore has taken into account the concerns addressed in the Proposed Amendment, and incorporate those concerns into a separate proposal. This proposal ("Group Proposal") satisfies the concerns addressed in the Proposed Amendment, while utilizing the recently adopted special master language from ARCP 53, which underwent significant vetting during the recent amendments to the Civil Rules. The Group believes that the Proposed Amendment, as modified herein, accomplishes all the goals identified by Judges Swann and McMurdie, while allowing for continued use, in limited circumstances, of family law masters over one party's objection.

1 Last, special masters exist in every area of law at both the state and federal  
2 level. Selectively removing the ability to use this resource over one party's  
3 objection in family court only puts practitioners, and more importantly, litigants,  
4 at a disadvantage and potentially creates due process issues due to the lack of  
5 adequate trial time.  
6

## 7 **II. Background of issues related to need for special masters**

8

9 The Proposed Amendment and the Group Proposal must be seen in the light  
10 of the reality of the family court system, given what is currently occurring,  
11 specifically in Maricopa County. To put it simply, trial courts are limiting the  
12 amount of trial time to an extent that it is nearly impossible to conduct any trial  
13 within the time allowed. While the excessive limitation on trial time has resulted  
14 in multiple cases being remanded back to the trial court due to the limitations on  
15 trial time, these practices continue, and are of serious concern, especially in  
16 Maricopa County. The case of *Volk v. Brame*, 235 Ariz 462, 333 P.3d. 789 (App.  
17 2014) illustrated the issues with the lack of trial time in Arizona as follows:  
18  
19

20 ¶1 This case requires us to reaffirm the importance of  
21 due process in family court.

22 ...

23 ...

24 ¶21 Though the court may impose time limits that  
25 appear reasonable in advance of a proceeding, those  
limits become unreasonable if they prove insufficient to  
allow a substantive hearing. If, during the progress of a  
scheduled hearing, it becomes apparent that the court  
lacks sufficient time to receive adequate testimony, then

1 the court must allow reasonable additional time or  
2 continue the hearing to permit it to perform its essential  
3 tasks.<sup>4</sup>

4 <sup>4</sup> In this case, it appears that the court felt  
5 constrained by the nature of its Tuesday and  
6 Wednesday calendars to limit the entire  
7 proceeding to a period of minutes despite the large  
8 quantity of evidence that required review.  
9 Whatever procedures the court adopts to organize  
10 and manage busy calendars, however, it can never  
11 lose sight of its fundamental obligation to afford  
12 due process to all parties. In some cases, this  
13 requirement will trump uniform case-management  
14 schemes.

15 The result of the *Volk* case, and the time constraints imposed in that hearing  
16 are not unique. The *Volk* decision has been utilized repeatedly to overturn trial  
17 court decisions where time constraints were imposed. Although *Volk* provides a  
18 remedy, that remedy is not always being consistently adhered to by the trial  
19 courts, and many litigants cannot afford the appellate review process to remedy  
20 any wrongs. The issue remains that few cases can ever afford appellate review,  
21 and while *Volk* may provide a remedy, it is the exception and not the rule.

### 22 **III. Comments and suggested modification for Proposed Amendment**

23 The Proposed Amendment lists the following concerns that necessitate  
24 amending the current rule. The Group responds to each concern and demonstrates  
25 how the Group Proposal not only solves the concerns, but addresses the concern  
without decimating the current Rule:

1        Appointment without Agreement

2        One of the issues addressed in the Proposed Amendment is the trial court's  
3        appointment of a special master without a stipulation of the parties. The language  
4        of the Proposed Amendment is as follows:

6                **A. Appointment and Compensation.** Upon written  
7                stipulation ~~by the parties and application by the parties,~~  
8                ~~or on the court's own motion~~ or oral agreement on the  
9                record in open court, the court may appoint a family law  
10              master who is an attorney or other professional with  
                education, experience, and special expertise regarding  
                the particular issues to be referred to the master.

11        The Group agrees that the court should not appoint a master if both parties  
12        do not believe one should be appointed. This is a derogation of the trial court's  
13        duty to hear the matter over the desires of the parties.

15        The issue arises when one of the parties requests a master, for issues such as  
16        discovery or to ensure that there is sufficient trial time for a complex issue, when  
17        the court is incapable of allowing for the time needed, or when expediency is an  
18        issue. Asking the obstructive party to agree to a method that will hold him/her  
19        accountable is an axiomatic request, and one to which they will never consent.

21        The current civil rule, ARCP 53, utilizes language that accomplishes the  
22        goal of the Proposed Amendment, while continuing to allow masters in defined  
23        and limited circumstances. ARCP 53 states:  
24

1                   **(a) Appointment.**

2                   **(1) Scope.** Unless a statute provides otherwise, a  
3                   court may appoint a master only to:

4                               **(A)** perform duties consented to by the  
5                               parties;

6                               **(B)** hold trial proceedings and make or  
7                               recommend findings of fact and  
8                               conclusions of law on issues to be decided  
9                               without a jury if appointment is warranted  
                              by:

10                                       **(i)** some exceptional condition; or

11                                       **(ii)** the need to perform an accounting  
12                                       or resolve a difficult computation of  
13                                       damages; or

14                               **(C)** address pretrial and post-trial matters  
15                               that cannot be effectively and timely  
16                               addressed by an available superior court  
                              judge in the county in which the court sits.

17   The Group Proposal modifies the Proposed Amendment's language to accomplish  
18   both tasks, as follows:

19                   **A. Appointment and Compensation.** The court may  
20                   appoint a family law master who is an attorney or other  
21                   professional with education, experience, and special expertise  
22                   regarding the particular issues to be referred to the master,  
                      upon either of the following:

23                               1. Upon written stipulation by the parties and  
24                               application by the parties, or on the court's own motion  
25                               or oral agreement on the record in open court, to perform  
                              the duties consented to by the parties. Compensation to  
                              be allowed to a family law master shall be fixed by the

1 court. The parties may stipulate to a particular family  
2 law master and the amount of compensation, but the  
3 court must approve the family law master and  
4 compensation, and the court shall review the  
5 qualifications of the family law master prior to  
6 appointment. Compensation of the family law master  
7 shall be allocated by the court and shall be treated as a  
8 recoverable cost.<sup>1</sup>

9 2. Upon written motion by either party only if  
10 warranted by: (a) some exceptional condition; or (b) the  
11 need to resolve complex matters, or (c) to address  
12 pretrial and post-trial matters that cannot be addressed  
13 effectively and timely by an available superior court  
14 judge in the county in which the court sits. Before  
15 making such appointment, the court shall also consider  
16 the fairness of imposing the likely expenses on the  
17 parties and the appointment order must protect against  
18 unreasonable expenses given the income, assets and  
19 issues to be heard by the master. Appointment of a  
20 master must not create a financial hardship on the  
21 parties. The court shall set financial limitations that are  
22 proportional to the size of the estate and the issues to be  
23 resolved. Compensation of the family law master shall  
24 be set by the court, and allocated by the court and treated  
25 as a recoverable cost.

18 The Group Proposal accomplishes the purpose of the Proposed  
19 Amendment, while allowing for limited use of family law masters over the  
20 objection of one party, and only after an analysis of the complexity of the case, the  
21 parties' ability to pay for such expense, and after determination that the expense  
22 will be proportional.  
23

---

25 <sup>1</sup> The introductory portion of Paragraph A, and Sub-Paragraph A1., in whole, substantially mirror the Proposed Amendment, however, the order and layout is changed slightly. The Group does not oppose the Proposed Amendment on these points.

1           Appointment of masters on child related issues

2           The Group agrees with the proposal that Rule 72 should not be an  
3 end run around the current Rule 74, to accomplish what the prior Rule 74  
4 allowed. But at the same time, should the parties agree, there is no reason that  
5 the parties should not be able to appoint a master on child related issues, such as  
6 parenting time or legal decision-making. The Proposed Amendment cites to  
7 issues under *Nold v. Nold*, 232 Ariz. 270, 304 P.3d 1093, (App. 2013), where the  
8 Court of Appeals held that:

9           the family court delegated its obligation to independently weigh the  
10 evidence in determining the children's best interests to the evaluator.  
11 *See DePasquale v. Superior Court (Thrasher)*, 181 Ariz. 333, 336,  
12 890 P.2d 628, 631 (App.1995). The family court “can neither  
13 delegate a judicial decision to an expert witness nor abdicate its  
14 responsibility to exercise independent judgment. The best interests of  
15 the child ... are for the [family] court alone to decide.” *Id.* By using  
16 the report as the baseline for custody, the family court delegated its  
judicial decision to the evaluator, abdicated its responsibility to  
decide the best interests of the children, and therefore abused its  
discretion.

17 *Id.* at 273, 304 P.3d. at 1096.

18           While *Nold* states that a trial court cannot blindly adopt the findings of an  
19 expert, that is not the same as utilizing a special master to conduct a proceeding.  
20 Experts are not quasi-judicial officers, and the rule still allows for judicial review  
21 of special master recommendations.  
22

23           The Proposed Amendment states:  
24

25           **B. Powers.** The order of reference appointing a family  
law master shall specify the particular issues referred to



1 the family law master and shall fix the time and place for  
2 beginning and closing the hearings and for filing the  
3 master's report. An appointment under this rule may not  
4 direct a master to perform services within the scope of  
5 Rule 74 or otherwise make decisions or  
6 recommendations concerning legal decision making or  
7 parenting time. Other than legal decision making and  
8 parenting time, ¶The master may deal with any issues  
9 pursuant to Title 25, A.R.S., that could be presented to  
10 the assigned judge including post-decree matters.  
11 Subject to any limitations in the order, the master shall  
12 exercise the power to regulate all proceedings in every  
13 hearing before the master and to do all acts and take all  
14 measures necessary or proper for the efficient  
15 performance of the master's duties under the order. The  
16 master may require the production of evidence upon all  
17 matters embraced in the reference. The master may rule  
18 upon the admissibility of evidence, unless otherwise  
19 directed by the order of reference, and has the authority  
20 to place witnesses under oath and may examine the  
21 parties and witnesses. When a party requests, the master  
22 shall cause a record to be made of the evidence offered  
23 and excluded in the same manner and subject to the  
24 same limitations as provided in Rule 104, Arizona Rules  
25 of Evidence, for a court sitting without a jury. The cost  
of the record shall be paid by the parties as allocated by  
the court and shall be a treated as a recoverable cost.

21 The Group Proposal would continue to allow for masters for child issues, only by  
22 agreement, as follows:  
23

24 **B. Powers.** The order of reference appointing a family  
25 law master shall specify the particular issues referred to  
the family law master and shall fix the time and place for

1 beginning and closing the hearings and for filing the  
2 master's report. ~~An appointment under this rule may not~~  
3 ~~direct a master to perform services within the scope of~~  
4 ~~Rule 74 or otherwise make decisions or~~  
5 ~~recommendations concerning legal decision making or~~  
6 ~~parenting time. Other than legal decision making and~~  
7 ~~parenting time, The~~ **THE** master may deal with any  
8 issues pursuant to Title 25, A.R.S., that could be  
9 presented to the assigned judge including post-decree  
10 matters **BUT MAY ONLY ADDRESS PARENTING**  
11 **TIME AND LEGAL DECISION-MAKING ISSUES**  
12 **IF APPOINTED BY STIPULATION UNDER**  
13 **SECTION A(1).** Subject to any limitations in the order,  
14 the master shall exercise the power to regulate all  
15 proceedings in every hearing before the master and to do  
16 all acts and take all measures necessary or proper for the  
17 efficient performance of the master's duties under the  
18 order. The master may require the production of  
19 evidence upon all matters embraced in the reference.  
20 The master may rule upon the admissibility of evidence,  
21 unless otherwise directed by the order of reference, and  
22 has the authority to place witnesses under oath and may  
23 examine the parties and witnesses. When a party  
24 requests, the master shall cause a record to be made of  
25 the evidence offered and excluded in the same manner  
and subject to the same limitations as provided in Rule  
104, Arizona Rules of Evidence, for a court sitting  
without a jury. The cost of the record shall be paid by  
the parties as allocated by the court and shall be treated  
as a taxable cost.

To accomplish the required review necessary to satisfy the *Nold* case, the Group  
Proposal also includes a change to Section H, as follows:

1           **H. Stipulation as to Findings.** At the time the master is  
2 appointed, the parties may stipulate that a master's  
3 findings of fact shall be final. When so stipulated, the  
4 court shall consider only questions of law arising from  
5 the master's report. Absent such a stipulation, the court  
6 shall not reverse the special master's findings of fact  
7 unless clearly erroneous and shall review conclusions of  
8 law *de novo*. **FOR PARENTING TIME OR LEGAL**  
9 **DECISION-MAKING ISSUES THE COURT**  
10 **SHALL DECIDE ALL OBJECTIONS BY**  
11 **REVIEWING FINDINGS OF FACT OR**  
12 **RECOMMENDATIONS *DE NOVO* PURSUANT TO**  
13 **A.R.S. § 25-401, *ET SEQ.*, TO DETERMINE IF THE**  
14 **RECOMMENDATIONS ARE IN THE CHILD'S**  
15 **BEST INTERESTS UNLESS THE PARTIES**  
16 **STIPULATE THE FINDINGS OF THE MASTER**  
17 **WILL BE FINAL.**

#### 18           **IV. Summary of Proposed Amendment**

19           The Group's proposed amendments would substantially conform ARFLP 72 to the  
20 existing Civil Rule under ARCP 53.

#### 21           **V. Request for Public Hearing under Rule 28(H)**

22           Given the breadth of the concern with this Rule change, as shown by the  
23 significant number of parties that make up the Group, this proposal requires a  
24 public hearing. Accordingly, the Group requests that the Court set a public  
25 hearing on the matter.

#### **Conclusion**

                  The Group submits proposed modifications to the Proposed Amendment in  
an effort to assist the Court with a rational amendment given the Group's  
knowledge, experience and expertise in representing parties and appearing before

1 the Courts of this State in family law matters. The members of the Group  
2 represent practitioners who are experts in this field, and organizations, such as the  
3 Arizona Chapter of the American Academy of Matrimonial Lawyers, that practice  
4 at the highest level of competence in family law. While the Group recognizes that  
5 not every case nor request necessitates the appointment of a family law master, this  
6 useful and valuable resource should be left available to the parties and the Court.  
7 The Group requests that the Proposed Amendment be adopted with the  
8 incorporation of the modifications proposed by the Group herein.

9  
10 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 2016.

11  
12 By /s/ Barry Brody  
13 Barry Brody#+  
14 Barry L. Brody, P.C.  
15 5050 East Thomas Road  
16 Phoenix, Arizona 85018  
[blb@divorceaz.com](mailto:blb@divorceaz.com)

17 By /s/ Annette Burns  
18 Annette Burns#+  
19 Law Office of Annette T. Burns  
20 2600 North Central Avenue  
21 Suite 900  
Phoenix, Arizona 85004  
[annette@btlawyers.com](mailto:annette@btlawyers.com)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

...  
...  
...  
...  
...

By /s/ Aris Gallios\*  
Aris Gallios#+  
Gallios Law Firm, P.C.  
3131 East Camelback Road  
Suite 230  
Phoenix, Arizona 85016  
[aris@gallioslaw.com](mailto:aris@gallioslaw.com)

By /s/ Helen R. Davis  
Helen R. Davis#+  
The Cavanagh Law Firm, P.C.  
1850 North Central Avenue  
Suite 2400  
Phoenix, Arizon  
a 85004  
[hdavis@cavanaghlaw.com](mailto:hdavis@cavanaghlaw.com)

By /s/ Keith Berkshire\*  
Keith Berkshire+  
Berkshire Law Office, PLLC  
5050 North 40<sup>th</sup> Street  
Suite 340  
Phoenix, Arizona 85018  
[keith@berkshirlawoffice.com](mailto:keith@berkshirlawoffice.com)

1       The following join in, support and endorse the Comment to Petition to  
2 Amend Ariz.R.Fam.L.P. 72 and Request for Hearing on Petition:

3  
4 Arizona Chapter of the American Academy of Matrimonial Lawyers (“AAML”)

5 By: /s/ Stephen R. Smith\*  
6 President, Arizona Chapter of AAML

7 /s/ Angela Hallier\*  
8 Phoenix Attorney+, Individually and AAML Fellow

9  
10 /s/ Thomas Griggs\*  
11 Mesa Attorney+, Individually and AAML Fellow

12 /s/ Robert Schwartz\*  
13 Phoenix Attorney+, Individually and AAML Fellow

14  
15 /s/ Leonard Karp\*  
16 Tucson Attorney+, Individually and AAML Fellow

17 /s/ Jennifer Gadow\*  
18 Phoenix Attorney+, Individually and AAML Fellow

19  
20 /s/ Ronald Sommer\*  
21 Tucson Attorney+, Individually and AAML Fellow

22 /s/ Sandra Tedlock\*  
23 Tucson Attorney+, Individually and AAML Fellow

1 /s/ Kiilu Davis\*  
2 Scottsdale Attorney+, Individually and AAML Fellow

3 /s/ Dana Levy\*  
4 Phoenix Attorney+, Individually and AAML Fellow

5  
6 /s/ David Horowitz\*  
7 Phoenix Attorney+, Individually and AAML Fellow

8  
9 /s/ Phil Gerard\*  
10 Phoenix Attorney+, Individually and AAML Fellow

11 /s/ Steven Everts\*  
12 Mesa Attorney+, Individually and AAML Fellow

13  
14 /s/ John Bolt\*  
15 Phoenix Attorney+, Individually and AAML Fellow

16 /s/ David Lieberthal\*  
17 Tucson Attorney+, Individually and AAML Fellow

18  
19 /s/ Annalisa Masunas\*  
20 Tucson Attorney+, Individually and AAML Fellow

21 /s/ Stephen R. Smith\*  
22 Phoenix Attorney+, Individually and AAML Fellow

23  
24 /s/ Laura Belleau\*  
25 Tucson Attorney+, Individually and AAML Fellow

1 /s/ James Stroud\*  
2 Tucson Attorney+, Individually and AAML Fellow  
3  
4 /s/ Lisa McNorton\*  
5 Tucson Attorney+, Individually and AAML Fellow  
6  
7 /s/ Steven Ellsworth\*  
8 Mesa Attorney+, Individually and AAML Fellow  
9  
10 /s/ Leonce Richard\*  
11 Phoenix Attorney+, Individually and AAML Fellow  
12  
13 /s/ Robert Jensen\*  
14 Phoenix Attorney+, Individually and AAML Fellow  
15  
16 /s/ Erika Cossitt Volpiano\*  
17 Tucson Attorney+, Individually and AAML Fellow  
18  
19 /s/ Aaron Blase\*  
20 Scottsdale Attorney  
21  
22 /s/ Erik Bergstrom\*  
23 Phoenix Attorney  
24  
25 /s/ Carissa Seidl\*  
Phoenix Attorney



1    /s/ Lisa Johnson Stone\*  
2    Scottsdale Attorney

3

4    /s/ Daniel Siegel\*  
5    Phoenix Attorney+

6

7    /s/ Susan Swick\*  
8    Phoenix Attorney+

9

10

11    /s/ Mitchell Reichman\*  
12    Phoenix Attorney+

13

14    /s/ Diana Baskind\*  
15    Scottsdale Attorney

16

17    /s/ Steven Serrano\*  
18    Phoenix Attorney

19

20    /s/ Andrea Paus\*  
21    Phoenix Attorney

22

23    /s/ Angela Peacock\*  
24    Chandler Attorney+

25

26    /s/ John Zarzynski\*  
27    Phoenix Attorney+

28

29    /s/ James Wees\*  
30    Phoenix Attorney+

1 /s/ Russell Wenk\*

2 Goodyear Attorney

3 /s/ David Rose\*

4 Phoenix Attorney+

5 /s/ Alexander Poulos\*

6 Phoenix Attorney

7 /s/ Mervyn Braude\*

8 Phoenix Attorney+

9 /s/ Judith Wolf\*

10 Phoenix Attorney

11  
12  
13  
14  
15  
16 Electronic copy filed with the Clerk  
17 of the Supreme Court of Arizona this  
18 5<sup>th</sup> day of July, 2016.

19 By: /s/ ANNETTE T. BURNS

20  
21  
22 \*Signed with electronic authorization.

23 #Fellow of the American Academy of Matrimonial Lawyers.

24 +State Bar of Arizona Certified Family Law Specialist